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**CORPORATE CRIMINAL LIABILITY: IS IT TIME TO SAY GOODBYE TO  
VICARIOUS LIABILITY AND HELLO TO CORPORATE ETHOS?**

by

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**MINOR-DISSERTATION**

**Submitted in partial fulfilment  
of the requirements for the degree**

**MASTER OF LAWS (LLM)**

in

**COMMERCIAL LAW**

in the

**FACULTY OF LAW**

at the

**UNIVERSITY OF JOHANNESBURG**

OF  
JOHANNESBURG

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**FEBRUARY 2016**

## ACKNOWLEDGEMENTS

I would like to thank my supervisor, Professor Kathleen Van der Linde, who has been an outstanding mentor and a tremendous help throughout the drafting of my dissertation. The assistance and advice given to me has been priceless and is highly appreciated.



## Abstract

In many countries across the world, the concept of corporate criminal liability has remained a complex term to understand. South Africa follows the nominalist theory to corporate law and as a result, the model adopted by the South African legislature is based on vicarious liability. This dissertation will analyse section 332(1) of the Criminal Procedure Act 51 of 1977 and consider whether or not the aforementioned section will pass constitutional muster. This dissertation will seek to demonstrate that section 332(1) is inconsistent with the supreme law of the Republic and that this infringement cannot be justified in terms of the limitation clause contained in the constitution. It is submitted that section 332(1) should be severed in such a manner in which the corporation will be given an opportunity to raise a defence. Alternatively section 332(1) should be repealed in its entirety and replaced with the organisational model as adopted in Australia. If one of these approaches is adopted, South Africa's approach to corporate criminal liability will be valid and thus constitutional.

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## 1. INTRODUCTION

Since its establishment, corporate criminal liability has always been a complex concept to understand and, as a result, subjecting corporations to mainstream criminal law is difficult.<sup>1</sup> This is because criminal law was originally developed to punish and deter or prevent individual wrongdoing,<sup>2</sup> as human beings are capable of committing unlawful acts and having a blameworthy state of mind.<sup>3</sup> Corporations on the other hand, are generally regarded as being fictitious legal entities incapable of physical action, knowledge or intention.<sup>4</sup> Therefore, the nature of a corporation had not been considered at the time when the basic principles of criminal liability were established.<sup>5</sup>

Corporations in all parts of the world play a crucial role in both national and international economies.<sup>6</sup> However, due to the rapid increases in the establishment of corporations since the 19<sup>th</sup> century, the need to hold corporations liable for their unlawful acts became apparent.<sup>7</sup> This is because today's society is faced with various types of criminal acts which were unknown in that era.<sup>8</sup> According to Wheelwright, corporations should be subjected to mainstream criminal law, because they have the potential to cause serious economic, social and environmental detriment.<sup>9</sup> There is a need to prevent such detriment by prosecuting and punishing reckless or negligent corporations.<sup>10</sup> In *S v Coetzee*,<sup>11</sup> Madala J emphasised that countries all over the world, including South Africa, are faced with crimes committed by corporations and that it is in the best interests of each country to ensure that there are adequate mechanisms in place to deal with such corporate crime.<sup>12</sup> Therefore, courts were faced with the problem as to how corporations could commit a crime and whether or not they

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<sup>1</sup> Wilkinson "Corporate criminal liability - the move towards recognising genuine corporate fault" 2005 *Canterbury Law Review* 142 142.

<sup>2</sup>Wilkinson (n 1) 142.

<sup>3</sup> Farisani "The regulation of corporate criminal liability in South Africa: a close look (Part 1)" 2006 *Obiter* 263 263.

<sup>4</sup> Wilkinson (n 1) 142.

<sup>5</sup> Borg-Jorgensen and Van der Linde "Corporate criminal liability in South Africa: time for change? (part1)" 2011 *TSAR* 452 453.

<sup>6</sup> Emeshesh "Corporate responsibility for crimes- thinking outside the box" 2005 *University of Botswana Law Journal* 28 28.

<sup>7</sup> Borg-Jorgensen and Van der Linde (n 5) 453.

<sup>8</sup> Stessens "Corporate criminal liability: a comparative perspective" 1994 *International and Comparative Law Quarterly* 493 493.

<sup>9</sup> Wheelwright " Goodbye directing mind and will, hello management failure: a brief critique of some new models of corporate criminal liability" 2006 *Australian Journal of Corporate Law* 1 2.

<sup>10</sup> Wheelwright (n 9) 2.

<sup>11</sup> 1997 1 SACR 379 (CC).

<sup>12</sup> Farisani (n 3) 263.

could be prosecuted for committing such crime, because corporations are incapable of thinking or acting for themselves.<sup>13</sup>

Although the constitutionality of section 332(1) of the Criminal Procedure Act 51 of 1977 has been considered by others, the primary aim of this dissertation is to critically analyse the aforementioned section, and determine if it is unconstitutional and thus invalid. The first part of the dissertation will consider the rationale behind corporate criminal liability as well as the manner in which the two main theories to corporate law, namely the nominalist theory and the realist theory, addresses corporate criminal liability. The second part of the dissertation will look at how South African law regulates corporate criminal liability in terms the Criminal Procedure Act.<sup>14</sup> Furthermore, it will also consider whether this approach violates a corporation's right to a fair trial generally and the right to be presumed innocent specifically. If it is found that this legislation does violate the abovementioned rights, the dissertation will analyse whether such violation is justifiable in terms of the limitations clause in section 36 of the constitution.<sup>15</sup> Lastly, if the violation is not justifiable in terms of the limitations clause, the dissertation will propose what the way forward should be in order to impose liability on corporations for crimes committed by them.

## 2. THE RATIONALE FOR CORPORATE CRIMINAL LIABILITY

Although the application of criminal law was initially limited to that of a natural person, responsible public policy dictates that legislation ought to be in place in order to deter those who victimise society through dangerous and unlawful acts.<sup>16</sup> In practice there is a great need to hold corporations criminally liable, because we are living in times of intense corporate activity and as a result corporations fulfil a fundamental role in society.<sup>17</sup> Therefore, to the extent to which a corporation's conduct victimises society, then it too should be deterred from committing criminal acts.<sup>18</sup> A policy that provides solely for the prosecution of natural persons could provide an incentive for a corporation to view a particular person as expendable.<sup>19</sup> This means that corporate policies may encourage unlawful behaviour, often

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<sup>13</sup> Borg-Jorgensen and Van der Linde (n 5) 453.

<sup>14</sup> 51 of 1977.

<sup>15</sup> The Constitution of the Republic of South Africa, 1996 (herein after referred to as the constitution).

<sup>16</sup> Bucy "Corporate ethos- a standard for imposing corporate criminal liability" 1990-1991 *Minnesota Law Review* 1095 1096.

<sup>17</sup> S v Coetzee 1997 1 SACR 379 (CC) and Snyman *Criminal law* (2008) 253.

<sup>18</sup> Bucy (n 16) 1096.

<sup>19</sup> Foerschler "Corporate criminal intent: Toward a better understanding of corporate misconduct" 1990 *California Law Review* 1287 1289.



implicitly, and then simply allow those individuals who are caught to take the fall for the corporate crime.<sup>20</sup> Although the individual may have been prosecuted, the incentive which led to the criminal behaviour remains intact and enforced within the corporation.<sup>21</sup>

### 3. THEORIES AND APPROACHES FOR IMPOSING LIABILITY UPON CORPORATIONS

As a result of the increase in corporate crime, countries began to realise the importance of imposing corporate criminal liability and ensuring that such liability is based on a reasonable and reliable theory.<sup>22</sup> Flowing from the two main theories of corporate law, namely the nominalist and realist theories, various approaches to corporate criminal liability have been formulated and have been relied upon in different jurisdictions across the world.<sup>23</sup>

#### 3.1. *The nominalist theory of corporate law*

In the case of the nominalist theory, a corporation is regarded as a fictional or artificial person.<sup>24</sup> This is nothing more than a group of individuals standing behind the corporation and as a result it lacks any substantive independent identity.<sup>25</sup> Therefore, “there is no room for recognition of an independent corporate fault”.<sup>26</sup> When this theory is applied to corporate criminal law the liability of the corporation is derived from the unlawful conduct of the people who form part of the corporation, such as directors, servants and employees.<sup>27</sup> In other words “the wrongful acts of the directors or employees of a corporation are regarded [as being the] wrongful acts of the corporation”.<sup>28</sup> Once the state has proved, beyond reasonable doubt, the guilt of the relevant individual and that the said individual was in fact acting with the relevant authority or within the scope of his employment, beyond reasonable doubt, then the unlawful act and culpability of the individual is imputed to the corporation.<sup>29</sup> Flowing

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<sup>20</sup> Foerschler (n 19) 1289.

<sup>21</sup> Foerschler (n 19) 1289.

<sup>22</sup> Farisani (n 3) 266.

<sup>23</sup> Borg-Jorgensen and Van der Linde (n 5) 453 and Farisani (n 3) 266.

<sup>24</sup> Borg-Jorgensen and Van der Linde (n 5) 453.

<sup>25</sup> Borg-Jorgensen and Van der Linde (n 5) 453.

<sup>26</sup> Borg-Jorgensen and Van der Linde (n 5) 453.

<sup>27</sup> Borg-Jorgensen and Van der Linde (n 5) 453.

<sup>28</sup> Farisani (n 3) 266.

<sup>29</sup> Jordaan “New perspectives on criminal liability of corporate bodies” 2003 *Acta Juridica* 48 48.

from this derivative approach to liability are two separate and distinct theories to corporate criminal liability, namely vicarious liability and the doctrine of identification.<sup>30</sup>

### 3.1.1. Vicarious liability

In any civilised legal system a person should not be held liable for the unlawful acts committed by another, unless he or she was party to the commission of the crime.<sup>31</sup> However, it is possible for an individual to be held liable for a crime committed by another, in which he or she is said to be vicariously liable for the illegal act.<sup>32</sup> “Vicarious liability justifies holding a corporation liable for crimes committed by its members, directors and employees in the process of furthering the interests of the corporation [or acting within the scope of their employment]”.<sup>33</sup> This form of liability has generally been rejected in criminal law, because criminal liability is based on the wrongful acts that a particular person committed and not for the unlawful acts of another.<sup>34</sup> Therefore, in the context of criminal law, it has been considered unjust to hold an individual liable for the criminal acts of another, without considering the fault on the part of the former.<sup>35</sup> In commonwealth countries a corporation will be liable for the wrongful acts of its employees or agents irrespective if the said employee or agent occupies a senior or junior position in the corporation.<sup>36</sup>

The rationale for holding a corporation responsible for the wrongful acts of those persons who form part of the corporation, including directors and agents, is due to the master-servant relationship that exists between the relevant parties.<sup>37</sup> Therefore, according to Snyman, vicarious liability encourages employers to ensure that their employees adhere to the law and

<sup>30</sup> Borg-Jorgensen and Van der Linde (n 5) 453.

<sup>31</sup> Snyman (n 17) 250.

<sup>32</sup> Snyman (n 17) 250.

<sup>33</sup> Farisani “Corporate homicide: what South Africa can learn from recent developments in English law” 2009 *CILSA* 210 212.

<sup>34</sup> Borg-Jorgensen and Van der Linde “Corporate Criminal Liability in South Africa: time for change? (part 2)” 2011 *TSAR* 684 687 and Jordaan (n 29) 49. In *Mousell Bros Ltd v London and North-Western Railway Co* 1917 2 KB 836 Lord Arkin set out the general principle of vicarious liability as follows:

“[P]rima facie a principal is not to be made criminally responsible for the acts of his servants, yet the Legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants. The question whether a particular provision imposes vicarious liability is one of construction, depending upon the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstance be performed, and the person upon whom the penalty is imposed”.

<sup>35</sup> Colvin “Corporate personality and criminal liability” 1995 *Criminal Law Forum* 1 2.

<sup>36</sup> Wilkinson (n 1) 150.

<sup>37</sup> Farisani (n 3) 265.

also prevents employers from hiding behind the mistakes of their employees, as the mistakes of the employees are attributed to the corporation.<sup>38</sup>

In order to hold a corporation vicariously liable a two-staged enquiry is followed.<sup>39</sup> Firstly, the court will have to determine whether or not the elements of a particular crime have been established in the conduct of the agent or the employee.<sup>40</sup> Secondly, if the court is satisfied that the relevant elements have been established, the elements are then imputed to the principal or the employer.<sup>41</sup> It is important to note that there is no pretence that the corporation committed the unlawful act or omission, the corporation is simply held responsible for the fault of another.<sup>42</sup>

However, vicarious liability is not without flaws, in that it has been subjected to two major criticisms.<sup>43</sup> Firstly, it is regarded as being over-inclusive as the corporation is held responsible for any unlawful act committed by an individual, irrespective of any fault on the part of the corporation.<sup>44</sup> Secondly, vicarious liability is also said to be under-inclusive because the corporation will not be liable for the unlawful acts of an individual, if all the elements of a particular offence are not met, although the corporation may be at fault to a certain degree, for example by encouraging criminal activity through its policies and practices.<sup>45</sup>

### 3.1.2. The doctrine of identification

The doctrine of identification has also been referred to as the “alter ego”, the “directing mind and will” or “organic” approach.<sup>46</sup> In terms of this doctrine, a corporation will only be liable for offences that require fault on the part of the individual who is regarded to be the mind and will or embodiment of the corporation.<sup>47</sup> In other words, “the conduct and state of mind of a [particular] high-ranking officer of the corporation should be regarded as the conduct and state of mind of the corporation itself [as they are regarded to be thinking on behalf of the

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<sup>38</sup> (n 17) 251.

<sup>39</sup> Lederman “Models for imposing corporate criminal liability: adaptation and imitation toward aggregation and the search for self-identity” 2000-2001 *Buffalo Criminal Law Review* 641 652.

<sup>40</sup> Lederman (n 39) 652.

<sup>41</sup> Lederman (n 39) 652.

<sup>42</sup> Wilkinson (n 1) 150.

<sup>43</sup> Wilkinson (n 1) 150 and Borg-Jorgensen and Van der Linde ( n 34) 688.

<sup>44</sup> Borg- Jorgensen and Van der Linde ( n 34) 688.

<sup>45</sup> Borg-Jorgensen and Van der Linde (n 34) 688.

<sup>46</sup> Borg-Jorgensen and Van der Linde (n 34) 684.

<sup>47</sup> Wheelwright (n 9) 3.

corporation]”.<sup>48</sup> Therefore, the corporation is deemed to be personally liable for the crime committed by its employees or agents and not vicariously liable.<sup>49</sup> In *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd*,<sup>50</sup> the court explained the doctrine of identification as follows:

“A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such”.

Determining whether a particular individual can be regarded as being the directing mind and will of the corporation will depend on the facts and circumstances of each case.<sup>51</sup> Generally only those officers and staff who are considerably high up the corporate hierarchy (ladder) can be regarded as the mind and will or embodiment of the corporation.<sup>52</sup> Examples of people who are regarded as being the will and mind of the corporation include the chief executive officer, the directors and other officers who are responsible for the development of corporate policy and the supervision of corporate activities.<sup>53</sup> However, an employee may be considered to be the mind and will of the corporation, despite not being a high-ranking officer, provided that the discretion conferred upon the relevant employee constitutes either express or tacit delegation of executive authority to design and supervise the implementation of corporate policy and not merely ensuring that such policy is being carried out.<sup>54</sup> Therefore, once the corporate power has been delegated to a particular employee, it must be complete and the employee must be able to perform his or her duties without being supervised.<sup>55</sup> It is

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<sup>48</sup> Kalima “Corporate criminal liability in environmental protection: options for Malawi” 2009 *South African Mercantile Law Journal* 344 346 and Farisani (n 33) 213.

<sup>49</sup> Wilkinson (n 1) 151.

<sup>50</sup> 1957 1 QB 159.

<sup>51</sup> Wheelwright (n 9) 3.

<sup>52</sup> Wheelwright (n 9) 3.

<sup>53</sup> Kalima (n 48) 347 and Wheelwright (n 9) 3.

<sup>54</sup> Wheelwright (n 9) 3.

<sup>55</sup> Borg-Jorgensen and Van der Linde (n 34) 686.

important to note that in order for such persons to be regarded as the mind and will of the corporation, they must act within the scope of their employment or authority.<sup>56</sup>

The doctrine of identification has been subjected to various criticisms.<sup>57</sup> Firstly, the doctrine is regarded as being too narrow, in that “it does not extend to the actions and state of mind of most of the personnel in the corporation”.<sup>58</sup> As a result of such narrow formulation, it is difficult to establish corporate criminal liability in large firms with multifaceted managerial structures, because crimes committed in such firms are often committed by middle-level management, which is too far down the corporate hierarchy to be identified with the corporation.<sup>59</sup> Therefore, the doctrine will be more effective in small corporations, with smaller and more focused managerial structures.<sup>60</sup> Offences will be committed by high-ranking individuals who may be identified with the corporation, as they will be responsible for working directly with or controlling contact with customers as well as employees.<sup>61</sup> Secondly, the doctrine of identification ignores the fact that the crimes committed by corporations are generally the result of corporate procedures and policies, rather than individual decisions, because the doctrine follows an individualistic approach and has no regard for the principle of aggregation.<sup>62</sup> Lastly, according to Wheelwright, the doctrine is fundamentally inadequate to address corporate fault, because a corporation may be held liable for the wrongful conduct of a senior officer without having regard to the presence of corporate fault.<sup>63</sup> Therefore, a corporation will be held liable for the criminal offence despite having reasonable precautions in place in order to prevent the offence.<sup>64</sup>

### 3.2. *The realist theory of corporate law*

In terms of the realist theory a corporation is considered to be a real entity that cannot simply be likened to those individuals who compose it.<sup>65</sup> This theory recognises the fact that

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<sup>56</sup> Borg-Jorgensen and Van der Linde (n 34) 686.

<sup>57</sup> Kalima (n 48) 347.

<sup>58</sup> Kalima (n 48) 347.

<sup>59</sup> Kalima (n 48) 347 ; Wheelwright (n 9) 4 and Wilkinson (n 1) 154.

<sup>60</sup> Borg-Jorgensen and Van der Linde (n 34) 686.

<sup>61</sup> Borg-Jorgensen and Van der Linde (n 34) 686.

<sup>62</sup> Borg-Jorgensen and Van der Linde (n 34) 686 and Kalima (n 48) 348.

<sup>63</sup> Jordaan (n 29) 56 and (n 9) 3.

<sup>64</sup> Jordaan (n 29) 56.

<sup>65</sup> Borg-Jorgensen and Van der Linde (n 5) 454.

corporations are entities with identifiable legal personas that have a presence in society that is distinct and separate from the directors, employees and agents.<sup>66</sup>

### 3.2.1. The organisational model of corporate criminal liability

In terms of this model, corporations are considered to be real entities that can acquire momentum and a dynamic of their own, which temporally transcend the actions of their officers and as a result corporations can incur criminal liability on their own.<sup>67</sup> Organisational theorists, such as Chester Barnard, emphasise the importance of viewing corporate actions as a result of the organisational structure of a particular corporation and not as a matter of individual choice.<sup>68</sup> According to Kalima, “the aims, intentions and knowledge required for criminal liability may be located in the policies, regulations, standing orders and institutionalised practices of corporations, and are not reducible to the aims, intentions and knowledge of individuals within the corporation”.<sup>69</sup> This is referred to the corporate culture model of corporate criminal liability. This model focuses on whether or not the practices and procedures of the corporation had contributed in some way to the commission of the crime.<sup>70</sup> Therefore, liability can be imputed to a corporation, irrespective which officer(s) in the corporate hierarchy committed the offence.<sup>71</sup>

According to the corporate culture model, a corporation will be held criminally liable for a crime if it is established that the corporation has a corporate culture that encourages employees, agents or officers to commit such crimes.<sup>72</sup> Therefore, in order for a corporation to be held liable, the state must prove that the corporation has a corporate culture that encourages criminal activity.<sup>73</sup> Alternatively, if legislation requires a corporation to create a corporate culture, then it must be proven that the corporation failed to establish and maintain a corporate culture including policies that require adherence to a particular provision.<sup>74</sup> As a

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<sup>66</sup> Borg-Jorgensen and Van der Linde (n 5) 454.

<sup>67</sup> Kalima (n 48) 356.

<sup>68</sup> Kalima (n 48) 356 and Foerschler (n 19) 1299.

<sup>69</sup> (n 46) 356.

<sup>70</sup> Wilkinson (n 1) 174.

<sup>71</sup> Wilkinson (n 1) 174.

<sup>72</sup> Van der Bijl “Corporate assault: bullying and the aegis of criminal law (part 2)” 2014 *Journal of South African Law* 760 761.

<sup>73</sup> Bucy (n 16) 1121.

<sup>74</sup> Borg-Jorgensen and Van der Linde (n 34) 697.

result, the corporation will be held liable in its own stead, in which emphasis is placed on corporate culture, policy and institutional practices.<sup>75</sup>

#### 4. CORPORATE CRIMINAL LIABILITY IN SOUTH AFRICA

As mentioned earlier, South Africa, like other countries over the world, is faced with the problem of dealing with corporations that commit criminal offences.<sup>76</sup> Although corporate criminal liability is a fairly new concept in South African law, until fairly recently, holding a corporation liable for a crime was not a common practice.<sup>77</sup>

Currently, corporate criminal liability in South Africa is regulated by section 332 of the Criminal Procedure Act 51 of 1977.<sup>78</sup> In *S v Coetzee*,<sup>79</sup> section 332 was described as a “comprehensive set of provisions...designed to facilitate the criminal prosecution of corporation... .”<sup>80</sup> This section is headed “Prosecution of corporations and members of associations,” and from this heading it is obvious that the section is not only aimed at corporations but it also regulates the prosecution of criminal offences committed by individuals belonging to associations that lack legal capacity.<sup>81</sup> The theoretical basis of the provision makes it clear that a corporation is incapable of performing an *actus reus* and cannot have a blameworthy state of mind.<sup>82</sup>

Section 332(1) of the Criminal Procedure Act provides as follows:

"[F]or the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law -

(a) any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, given by a director or servant of that corporate body; and

(b) the omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that corporate body,

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<sup>75</sup> Van der Bijl (n 72) 762.

<sup>76</sup> Farisani (n 3) 263.

<sup>77</sup> Farisani (n 33) 211.

<sup>78</sup> Borg-Jorgensen and Van der Linde (n 5) 456 and Farisani (n 33) 211.

<sup>79</sup> 1997 3 SA 527 (CC).

<sup>80</sup> Borg-Jorgensen and Van der Linde (n 5) 456.

<sup>81</sup> Farisani (n 3) 273.

<sup>82</sup> Jordaan (n 29) 50.

in the exercise of his powers or in the performance of his duties as such director or servant or in furthering or endeavouring to further the interests of that corporate body, shall be deemed to have been performed (and with the same intent, if any) by that corporate body or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body."

From section 332(1), it is clear that the South African approach to corporate criminal liability is in essence that of vicarious liability, because it relies on a special relationship between the individual and the corporation and the liability of the corporation is based on the act and culpability of the individual.<sup>83</sup> However, section 332(1) goes beyond the traditional scope of vicarious liability, as the fault of the director<sup>84</sup> or servant<sup>85</sup> is imputed to the corporation even where the director or servant acted beyond the course of his or her duties or scope of employment in order to further the interests of the corporation.<sup>86</sup> By extending the liability of the corporation beyond the traditional scope of vicarious liability, which would usually render the corporation liable for the criminal offences committed by its employees who acted within scope of their employment or authority, section 332(1) may be said to have disregarded the then enforceable doctrine of *ultra vires*.<sup>87</sup> Therefore, the liability of a corporation is based on the fact that a director or servant of the corporation was furthering or attempting to further the interests of the corporation.<sup>88</sup> It is important to note that a corporation can be held liable for the wrongful act committed by an individual who is neither a director nor a servant of the corporation, provided the act was performed in accordance with instructions or on authority of a director or servant.<sup>89</sup>

Section 332(1) makes it possible for a corporation to be convicted of criminal offences based on fault (including intention and negligence) as well as strict liability.<sup>90</sup> Where a criminal offence is based on fault, the negligence or intent (*mens rea*) of the director or servant will be

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<sup>83</sup> Borg-Jorgensen and Van der Linde (n 5) 457 and Jordaan (n 29) 50.

<sup>84</sup> The definition of director is set out in section 332(10) Criminal Procedure Act 51 of 1977 as: "any person who controls or governs that corporate body or who is a member of a body or group of persons which controls or governs that corporate body or, where there is no such body or group, who is a member of that corporate body".

<sup>85</sup> The definition of a "servant" is not set out in the Criminal Procedure Act 51 of 1977, but there is no indication that it should not be given its ordinary meaning. Therefore, a servant includes any individual who performs his or her work under the control or supervision of the corporation and who is entitled to remuneration.

<sup>86</sup> Borg-Jorgensen and Van der Linde (n 5) 457.

<sup>87</sup> Nana "Corporate criminal liability in South Africa: the need to look beyond vicarious liability" 2011 *Journal of African Law* 86 94-95

<sup>88</sup> Kalima (n 48) 360.

<sup>89</sup> Kalima (n 48) 360.

<sup>90</sup> Borg-Jorgensen and Van der Linde (n 5) 456.



attributed to the corporation.<sup>91</sup> Therefore, since intent and negligence are human attributes, holding a corporation responsible for the criminal offences committed by directors or servants has resulted in the situation where it is possible for a corporation to be convicted of crimes which can, strictly speaking, only be committed by natural persons.<sup>92</sup> It is important to note that section 332(1) refers to crimes committed with intent as well as negligence since negligence is an example of an element of a crime committed without intent. Therefore it is possible for a corporation to be convicted of culpable homicide, a crime requiring *mens rea* in the form of negligence, because the section expressly provides for liability of both common law and statutory offences.<sup>93</sup> In *R v Bennett and Co(Pty) Ltd*,<sup>94</sup> the court imputed the negligent conduct of the individual, which caused the death of an employee, to the corporation and as a result found the corporation guilty of culpable homicide.<sup>95</sup> This decision is in line with section 332(1) in that it does not purport to give a corporation human attributes, but rather it regards the act and culpability of the corporation's director or servant as the act and culpability of the corporation.<sup>96</sup> However, in *S v Suid Afrikaanse Uitsaaikorporasie*,<sup>97</sup> the court interpreted section 332(1) in such a manner as to exclude crimes in which negligence as an element had to be proven.<sup>98</sup> This decision was not seen to be a correct interpretation of section 332(1) and as a result was subsequently overturned by the appellate division in *Ex Parte Minister van Justisie: in Re S v Suid Afrikaanse Uitsaaikorporasie*.<sup>99</sup> In this case, the appellate division upheld the decision in *R v Bennett and Co(Pty) Ltd*<sup>100</sup> and held that a corporation can be held liable for crimes of negligence which were committed by its directors or servants, even if the corporation can prove that it had exercised due diligence.<sup>101</sup> Therefore, the current position in South Africa is that the *mens rea* of the director or servant of the corporation is accredited to the corporation.<sup>102</sup> In other words the corporation will be criminally liable for crimes committed by individuals on the basis that the *mens rea* of the individual is regarded as being the *mens rea* of the corporation.<sup>103</sup>

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<sup>91</sup> Borg-Jorgensen and Van der Linde (n 5) 456 and Farisani "Corporate criminal liability for deaths, injuries and illnesses: is South Africa's mining sector ready for change?" 2012 *Speculum Juris* 38 41.

<sup>92</sup> Farisani (n 91) 41.

<sup>93</sup> Farisani (n 33) 215 and Rycroft "Corporate homicide" 2004 *South African Journal of Criminal Justice* 141 150.

<sup>94</sup> 1941 TPD 194.

<sup>95</sup> Farisani (n 91) 41.

<sup>96</sup> Farisani (n 91) 42 and Farisani (n 33 (2009)) 215.

<sup>97</sup> 1991 2 SA 698 (W).

<sup>98</sup> Farisani (n 33) 216.

<sup>99</sup> 1992 4 SA 804 (A) and Farisani (n 33) 216.

<sup>100</sup> 1941 TPD 194

<sup>101</sup> Farisani (n 33) 216 and Jordaan (n 29) 53.

<sup>102</sup> Farisani (n 33) 216 and *S v Dersley* 1997 2 SACR 253.

<sup>103</sup> Farisani (n 33) 217.

In order to hold a corporation liable for the criminal offences of its directors, servants or any other person who has been given the authority or permission to commit the offence, the state must prove beyond reasonable doubt that the relevant individual committed the offence in the process of furthering or attempting to further the interests of the corporation.<sup>104</sup> Failure to do so would result in the corporation escaping liability.<sup>105</sup> It is important to note that knowledge on the part of the corporation or its members of the particular criminal act or omission is not a relevant consideration in determining criminal liability.<sup>106</sup>

## **5. THE CONSTITUTIONALITY OF SECTION 332(1) OF THE CRIMINAL PROCEDURE ACT 51 OF 1977**

One of the most important principles upon which South African law is built upon is constitutional supremacy.<sup>107</sup> This principle is entrenched in section 2 of the constitution, which states that “[The] constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”. Constitutional supremacy entails that all the rules and principles set out in the constitution are binding upon all spheres of government and have priority over any law which is made by government or the judiciary.<sup>108</sup> In *Executive Council of the Western Cape Legislature v President of the Republic of South Africa*,<sup>109</sup> the constitutional court held that any law or conduct which is inconsistent with the provisions of the constitution, either for procedural or substantive reasons, will not have the force of the law.<sup>110</sup> If the provisions of the constitution were not justifiable, then constitutional supremacy would not be effective.<sup>111</sup> Therefore, in order for a constitution to be supreme as well as effective, its provisions must be enforced by the judiciary who is independent, impartial and objective.<sup>112</sup> Section 172(1) of the constitution provides that when a court presides over a particular matter falling within its jurisdiction, the court must declare that any law or act which is inconsistent with the constitution, is invalid to the extent of its inconsistency and make any order it deems just and

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<sup>104</sup> Farisani (n 33) 217.

<sup>105</sup> Farisani (n 33) 217.

<sup>106</sup> Jordaan (n 29) 51.

<sup>107</sup> Currie and De Waal *The Bill of Rights Handbook* (2013) 9.

<sup>108</sup> Currie and De Waal (n 107) 9 and s 8(1) of the constitution.

<sup>109</sup> 1995 4 SA 877 (CC).

<sup>110</sup> Currie and De Waal (n 107) 9.

<sup>111</sup> Currie and De Waal (n 107) 9.

<sup>112</sup> Currie and De Waal (n 107) 9.

equitable. However, before such declaration of invalidity will have any effect, it must be confirmed by the Constitutional Court.<sup>113</sup>

### 5.1. Application of the bill of rights

Entrenched in chapter two of the constitution is a provision that expressly provides that juristic persons, ie corporations, are entitled to be protected by the rights contained in the bill of rights.<sup>114</sup> In order to determine whether or not a corporation is protected by a particular right in the bill of rights, two factors must be considered: firstly, the nature of the fundamental right and secondly, the nature of the juristic person.<sup>115</sup> The nature of some of the fundamental rights makes it impossible for a corporation to be protected by particular rights as they cannot be sensibly applied to corporations,<sup>116</sup> such as the rights to life<sup>117</sup> and human dignity.<sup>118</sup> Although a corporation may be entitled to benefit from certain rights, the Constitutional court<sup>119</sup> held that a corporation is only entitled to a reduced level of protection compared to natural persons in respect of rights which are derived from human dignity.<sup>120</sup> In other words, it is possible for a corporation to be protected by a particular right, but not to the same extent as a natural person.<sup>121</sup>

It is the second factor - the nature of the juristic person - that places a greater restriction as to whether or not a corporation is entitled to benefit from human rights.<sup>122</sup> The size or the activities performed by the corporation is not a decisive factor, but rather the relationship that exists between the activities of the corporation and fundamental rights of the individuals who stand behind the corporation.<sup>123</sup> Put differently, “[corporations] are not in and of themselves worthy of protection, but they become so when they are used by the natural persons for the collective exercise of their fundamental rights”.<sup>124</sup> Therefore, section 8(4) of the constitution

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<sup>113</sup> s 172(2)(a) of the constitution.

<sup>114</sup> s 8(4) of the constitution and *Borg-Jorgensen and Van der Linde* (n 5) 457.

<sup>115</sup> *Currie and De Waal* (n 107) 36 and s 8(4) of the constitution.

<sup>116</sup> *Currie and De Waal* (n 107) 36.

<sup>117</sup> s 11 of the constitution.

<sup>118</sup> s 10 of the constitution.

<sup>119</sup> *Investigation Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO 2001 1 SA 545 (CC)*.

<sup>120</sup> *Currie and De Waal* (n 107) 36.

<sup>121</sup> *Borg-Jorgensen and Van der Linde* (n 5) 458.

<sup>122</sup> *Currie and De Waal* (n 107) 36.

<sup>123</sup> *Currie and De Waal* (n 107) 37.

<sup>124</sup> *Currie and De Waal* (n 107) 37.

entails that there must be a link between the activities of the corporation and protecting the fundamental human rights of those individuals who stand behind the corporation.<sup>125</sup>

Even though a corporation had reasonable precautions in place and exercised due diligence in order to prevent a crime from occurring, it is nonetheless held vicariously liable for the occurrence of the crime.<sup>126</sup> This is because any act performed by or with the authority of a director or servant of the corporation is deemed to be the act of the corporation, provided that such act was performed with the intention to further or attempt to further the interests of the corporation.<sup>127</sup> As a result a corporation is not entitled to raise any defence that it had reasonable mechanisms or procedure in place to prevent the crime from occurring or that it acted with due diligence, because the corporation is considered to be guilty without fault, based on the fact that the individual is guilty.<sup>128</sup> Section 332(1) thus has the potential to violate the overarching fundamental right to a fair trial and more specifically the right to be presumed innocent.<sup>129</sup> These two rights are expressly contained in section 35(3) and 35(3)(h) of the constitution.

## 5.2. *Right to a fair trial - section 35(3)*

In South Africa, every accused, arrested or detained person is protected by the right to a fair trial which is guaranteed in section 35(3) of the constitution. This right is universally recognised in various fundamental international human rights instruments, such as article 10 of the Universal Declaration on Human Rights, article 14(1) of the International Covenant on Civil & Political Right and article 7 of the African Charter on Human and Peoples' Rights.<sup>130</sup> According to Van der Walt, "[t]he right to a fair trial is a cornerstone of any civilised criminal justice system and it is the duty of every presiding officer to ensure that this right is not unjustifiably infringed upon during the course of a criminal trial".<sup>131</sup>

In *S v Thebus*,<sup>132</sup> Yacoob J explained that each and every presiding officer is under a duty to ensure that the right to a fair trial is fulfilled and that the fulfilment of this duty carries various implications.<sup>133</sup>

<sup>125</sup> Currie and De Waal (n 107) 37.

<sup>126</sup> Borg-Jorgensen Van der Linde (n 5) 458.

<sup>127</sup> Nana (n 87) 90.

<sup>128</sup> Borg-Jorgensen and Van der Linde (n 5) 458 and Farisani (n 33) 219.

<sup>129</sup> Borg-Jorgensen and Van der Linde (n 5) 458 and Farisani (n 33) 219.

<sup>130</sup> Van der Walt "The right to a fair trial revisited: *S v Jaipal*" 2006 *Journal of Criminal Justice* 315 316.

<sup>131</sup> (n 130) 316.

<sup>132</sup> 2003 2 SACR 319 (CC).

These include,

- (1) that all courts have a duty to ensure that both procedural as well as substantive fairness is achieved;
- (2) courts must give effect and substance to the notion of a fair trial;
- (3) that the entire proceedings must be fair and therefore balancing the interests of the accused with that of the society's as a whole and lastly,
- (4) a presiding officer must respect, promote, protect and fulfil all the fundamental rights contained in the bill of rights.<sup>134</sup>

It is important to note that the right to a fair trial is a comprehensive and integrated right and does not merely consist of a collection of sub-rights.<sup>135</sup> The content of the right to a fair trial will vary from case to case, as it has to be determined on a case to case basis.<sup>136</sup>

### 5.3. *The right to be presumed innocent - section 35(3)(h)*

Flowing from the right to a fair trial is another fundamental right which is guaranteed in the constitution, namely, the right to be presumed innocent.<sup>137</sup> “The presumption of innocence is a basic rule of both criminal law and constitutional law”.<sup>138</sup> This basic rule has been adopted into South African law from English common law and is now seen as a fundamental legal principle.<sup>139</sup> Therefore, as a result of the presumption of innocence, every accused person is entitled to be regarded innocent, until properly convicted in a South African court of law.<sup>140</sup> The Constitutional court, in *S v Manamela*,<sup>141</sup> stated that the rationale behind the presumption of innocence is to reduce the risk of innocent persons being wrongfully convicted and punished. In order to ensure that this purpose is achieved, the onus is on the state to prove the guilt of the accused beyond reasonable doubt and thus, reducing the risk of the court making a mistake in its overall assessment of evidence tendered during the course of the trial.<sup>142</sup> As a result, the state has to adequately establish each and every element of a particular crime, as defined in criminal law, by providing concrete and admissible evidence in order to prove that

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<sup>133</sup> Van der Walt (n 130) 317.

<sup>134</sup> Van der Walt (n 130) 317.

<sup>135</sup> *S v Dzukada; S v Tshilo* 2000 2 SACR 443 and Van der Walt (n 130) 317.

<sup>136</sup> Van der Walt (n 130) 317.

<sup>137</sup> s 35(3)(h) of the constitution.

<sup>138</sup> Kitai “Presuming innocence” 2002 *Oklahoma Law Review* 257 260.

<sup>139</sup> Skeen “A bill of Rights and the presumption of innocence” 1993 *South African Journal on Human Rights* 525 525.

<sup>140</sup> Joubert, Geldenhuys, Swanepoel, Terblanche and Van der Merwe *Criminal Procedure Handbook* (2014) 18.

<sup>141</sup> 2000 1 SACR 414 (CC).

<sup>142</sup> *S v Manamela* 2000 1 SACR 414 (CC) and *S v Zuma* 1995 1 SACR 568 (CC).

the accused is *prima facie* guilty of committing the alleged crime.<sup>143</sup> However, if the State fails to prove but a single element of the crime beyond reasonable doubt, the accused may be acquitted at the end of the State's case, without the accused having to state his or her case.<sup>144</sup> Therefore, according to South African case law,<sup>145</sup> the presumption of innocence is used to describe two different phenomena, firstly, as a principle regulating the burden of proof and secondly, a policy directive that the accused, in any criminal trial, is innocent until proven guilty irrespective of the probable outcome of the trial.<sup>146</sup> The second phenomenon is a result of the first, in that if the guilt of the accused is dependent on the state proving its case beyond reasonable doubt, then the accused is innocent until the state has successfully discharged its burden of proof.<sup>147</sup> "In this way the reasonable doubt rule conveys powerful symbolic messages to all criminal justice functionaries and to the community at large".<sup>148</sup>

### 5.3.1. Are corporations entitled to be presumed innocent until proven guilty?

Although it has not yet been judicially determined, the nature of the fair trial rights of an accused person contained in section 35(3) of the constitution does not make them unavailable to corporations and there appears to be no reason why a corporation should not be entitled to rely on most of the rights contained in the section.<sup>149</sup>

According to Jordaan, on the one hand it may be argued that only responsible agents, thus natural persons who are capable of reason, capable of exercising control and of choosing whether or not to adhere to the law, are entitled to the protection afforded by the presumption of innocence.<sup>150</sup> This is because the notion that a corporation has a real existence which is independent of the natural persons who compose it, with capacity for moral blameworthiness, is not recognised in South African law.<sup>151</sup> As a result the right to be presumed innocent is limited to natural persons only.<sup>152</sup> On the other hand, it may be contended that a corporation is entitled to invoke the right of the presumption of innocence, because legal theories

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<sup>143</sup> Joubert et al (n 140) 19.

<sup>144</sup> Joubert et al (n 140) 19 and s 174 of the Criminal Procedure Act 51 of 1977.

<sup>145</sup> *Nortje v Attorney-General Cape* 1995 1 SACR 446 (CC); *R v Ndhlovu* 1945 AD 369; *S v Coetzee* 1997 3 SA 527 (CC); *S v Essak* 1965 2 SA 161 (D); *S v Gokool* 1965 3 SA 461 (N); *S v Lavhengwa* 1996 2 SACR 453 (W) and *S v Nombewu* 1996 2 SACR 369 (E).

<sup>146</sup> Currie and De Waal (n 107) and Schwikkard "The presumption of innocence: What is it?" 1998 *South African Journal of Criminal Justice* 396 403.

<sup>147</sup> Schwikkard (n 146) 403.

<sup>148</sup> Schwikkard (n 146) 403.

<sup>149</sup> Borg-Jorgensen and Van der Linde (n 5) 458 and Jordaan (n 29) 67.

<sup>150</sup> Borg-Jorgensen and Van der Linde (n 5) 458 and (n 29) 67.

<sup>151</sup> Borg-Jorgensen and Van der Linde (n 5) 458 and Jordaan (n 29) 67.

<sup>152</sup> Jordaan (n 29) 67.

concerning the nature of legal personality should not be a crucial consideration in determining which particular fair trial rights may be invoked by a corporation.<sup>153</sup> However, the only exception is where a fundamental human right is incapable of being invoked by a corporation, for example the right to life.<sup>154</sup>

It is respectfully submitted that the latter view should be preferred, ie that a corporation is entitled to the right to be presumed innocent, and as a result there is a duty upon the state to protect and respect the rights of the corporation.<sup>155</sup> This duty means not only that the state must not violate rights, but also that it must have reasonable measures in place in order to prevent the infringement of rights.<sup>156</sup>

Therefore section 332(1) does in fact violate a corporation's overarching right to a fair trial and more specifically the right to be presumed innocent, because the liability of the corporation is established on the basis of the liability of the individual, irrespective of whether the corporation had taken all reasonable precautions in order to prevent a particular crime from occurring.<sup>157</sup> In other words, as a result of the extremely broad provision<sup>158</sup> which imposes a form of vicarious liability upon the corporation, it is liable for any criminal offence committed by a director, servant or any other person acting with the authority or permission of a director or servant.<sup>159</sup> This is, thus, contrary to well established common law principle to ensure that all trials are procedurally fair, namely, *audi alteram partem* principle.<sup>160</sup> According to this principle a presiding officer is obliged to hear both sides of every case, he or she cannot simply listen to the plaintiff or prosecutor and not to the defendant.<sup>161</sup> If the prosecutor is the only party who is given an opportunity to state its case, it would be unfair to the unheard party.<sup>162</sup> Although corporations are given the opportunity to plead its case in order to influence the outcome of decisions that will affect them, its case is confined to whatever the directors, servants or agents could raise in defence.<sup>163</sup> Therefore, in order to fully give effect to the *audi alteram partem* principle, corporations should be given the opportunity to raise a defence that is completely independent from that which was raised by the directors, servants and agents and not simply to disprove the elements required by section

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<sup>153</sup> Borg-Jorgensen and Van der Linde (n 5) 458 and Jordaan (n 29) 67.

<sup>154</sup> Borg-Jorgensen and Van der Linde (n 5) 458 and Jordaan (n 29) 67.

<sup>155</sup> Borg-Jorgensen and Van der Linde (n 5) 458, Jordaan (n 29) 67 and s 7(2) of the constitution.

<sup>156</sup> Rautenbach and Malherbe *Constitutional Law* (2009) 325.

<sup>157</sup> Borg-Jorgensen and Van der Linde (n 34) 700, Farisani (n 33) 219 and Jordaan (n 29) 68.

<sup>158</sup> s 332(1) of the Criminal Procedure Act 51 of 1977.

<sup>159</sup> Borg-Jorgensen and Van der Linde (n 34) 700.

<sup>160</sup> Hoexter *Administrative law in South Africa* (second edition) 363.

<sup>161</sup> Kelly "Audi alteram partem" 1964 *Natural Law Forum* 103 103.

<sup>162</sup> Kelly (n 161) 103.

<sup>163</sup> Hoexter (n 160) 363.

332(1). In *Administrator Transvaal and Others v Traub and Others*,<sup>164</sup> the appellate division held that the *audi alteram partem* principle will apply whenever a statute empowers an authoritative body to make a decision which will prejudicially affect the liberty, property or rights of an individual, the latter has the right to be heard before the decision is made, unless the statute expressly or by way of implication indicates otherwise. As a result, the application of the principle is two-fold: firstly, it gives the individual an opportunity to be heard before he or she is adversely affected by the decision and secondly, it gives the decision-maker, ie the presiding officer in this case, a chance to obtain all the necessary information in order to make an informed decision when exercising his or her power.<sup>165</sup> Therefore, the *audi alteram partem* principle should automatically be applied, unless it is excluded by a particular statute.<sup>166</sup>

#### 5.4. Is section 332(1) of the Criminal Procedure Act a justifiable limitation?

The mere fact that section 332(1) violates a corporation's right to a fair trial and right to be presumed innocent, does not automatically make the section unconstitutional and thus invalid, because constitutional rights and freedoms are not absolute.<sup>167</sup> This means that the violation may be justified in terms of the limitation clause set out in the constitution.<sup>168</sup> In *Du Toit v Minister for Welfare and Population Development*,<sup>169</sup> the Constitutional court, held that when a person who has infringed upon a right of another fails to justify that infringement, and the constitutionality of the provision is a matter of paramount public interest, the judiciary must still consider whether the limitations are justifiable in terms of the limitation clauses. However, it is important to note rights cannot be limited for any reason because the purpose behind limiting a particular right has to be exceptionally compelling and must adhere to the strict requirements set out in the limitation clause.<sup>170</sup> It is not simply a question of deciding whether the benefits provided by the limitation outweigh the cost to the holder of the right.<sup>171</sup> If this was the case then there would be little need to have such rights

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<sup>164</sup> 1989 4 SA 731 (A).

<sup>165</sup> Burns "Subordinate legislation and the *audi alteram partem* rule" 1991 *South African Public Law* 282 282.

<sup>166</sup> Carpenter "Fundamental rights, security legislation and the *audi alteram partem* rule - still no congruence in the Appellate Division" 1989 *South African Public Law* 87 88.

<sup>167</sup> Currie and De Waal (n 107) 150 and Van der Linde "The personal liability of directors for corporate fault – an exploration" 2008 *South African Mercantile Law Journal* 439 453.

<sup>168</sup> Borg-Jorgensen and Van der Linde (n 5) 459.

<sup>169</sup> 2003 2 SA 198 (CC).

<sup>170</sup> Currie and De Waal (n 107) 151.

<sup>171</sup> Currie and De Waal (n 107) 151.



constitutionally guaranteed.<sup>172</sup> Section 36 of the constitution sets out the requirements as to when a limitation will be permissible.

It stipulates that:

“The rights in the bill of rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors,

- a) the nature of the right;
- b) the importance of the purpose of the limitation;
- c) the nature and extent of the limitation;
- d) the relation between the limitation and its purpose; and
- e) less restrictive means to achieve the purpose”.

It is clear that the abovementioned provision sets out the criteria for determining what would constitute a good reason for restricting rights.<sup>173</sup> Therefore, in order for a law to limit a right, it must comply with two requirements: firstly, the law must be of general application and secondly, it must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.<sup>174</sup>

The first requirement, ie that the limitation law must be of general application, is the minimum requirement to validly limit a right, as the limitation must be authorised by law which is of general application.<sup>175</sup> This means that the legislature may not limit constitutional rights of a particular person or in respect of a unique set of circumstances.<sup>176</sup> This requirement is said to be an expression of the basic constitutional law principle, which South Africa is founded upon, namely the rule of law.<sup>177</sup> In terms of the rule of law, the exercise of rights and freedoms by a person may not be denied through the arbitrary exercise of discretionary powers of the state.<sup>178</sup> The Constitutional Court has interpreted this requirement, on a level of form, to mean that the law must be sufficiently clear, accessible

<sup>172</sup> Currie and De Waal (n 107) 151.

<sup>173</sup> Currie “Balancing and the limitation of rights in the South African constitution” 2010 *Southern African Public Law* 408 410.

<sup>174</sup> Currie and De Waal (n 107) 155.

<sup>175</sup> Currie and De Waal (n 107) 155.

<sup>176</sup> Rautenbach and Malherbe (n 156) 346.

<sup>177</sup> Currie and De Waal (n 107) 155 and s 1(c) of the constitution.

<sup>178</sup> Rautenbach and Malherbe (n 156) 9.

and precise in order to ensure that those affected by it can determine the extent of their rights and obligations.<sup>179</sup> However, on a substantive level it means that law must, at least, apply impersonally, it must be applied equally and it must not be arbitrary in its application.<sup>180</sup> From the above, it is clear that the state is permitted to limit a corporation's right to a fair trial and more specifically the right to be presumed innocent, as they are clearly authorised by section 332(1). This section<sup>181</sup> is a law of general application, as it is not only clear, precise and easily accessible, but it applies to all corporations irrespective of the size, business or financial power of the corporation. Therefore, the first requirement of section 36 of the constitution is satisfied by section 332(1).

The second requirement, ie that the limitation must be reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom, requires a court to balance or weigh up the conflicting interests, which is ultimately an assessment based on proportionality.<sup>182</sup> Therefore, in *S v Bhulwana; S v Gwadiso*<sup>183</sup> the Constitutional court held that:

“...the court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.”

In order to determine if a limitation is reasonable and justifiable, a court will have to consider all the relevant factors set out in section 36 of the constitution. It is important to note that the factors listed in section 36(1) is not an exhaustive list and the court may consider any relevant factor it deems necessary.<sup>184</sup>

#### 5.4.1. The nature of the right- section 36(1)(a)

This factor is used as a measure in order to determine the ability of a particular right to be limited.<sup>185</sup> The nature of the right relates predominantly to the significance of the right to the constitution's ambition to create an open and democratic society based on human dignity,

<sup>179</sup> *Dawood v Minister of Home Affairs* 2000 30 SA 936 (CC); *Affordable Medicines Trust v Minister of Health* 2006 2 SA247 (CC) and *Currie et al* (n 151) 156.

<sup>180</sup> *Currie and De Waal* (n 107) 156.

<sup>181</sup> s 332(1) of the Criminal Procedure Act 51 of 1977.

<sup>182</sup> *S v Makwanyane* 1995 3 SA 391 (CC) and *Currie* (n 173) 411.

<sup>183</sup> 1996 1 SA 388 (CC) par 18.

<sup>184</sup> *Rautenbach and Malherbe* (n 156) 347.

<sup>185</sup> Iles “A fresh look at limitations: unpacking section 36” 2007 *South African Journal on Human Rights* 68 80.

equality and freedom.<sup>186</sup> The nature of the right also refers to who is entitled to rely on the protection afforded by the right: whether the bearer is a natural or juristic person could influence the strictness of the standard.<sup>187</sup> Although it is trite in South Africa that no right is absolute, the nature of certain rights make it impossible for that right to be limited or allow it to only be limited in a particular way.<sup>188</sup> An example of a right that cannot be limited is the right not to be subjected to slavery.<sup>189</sup> As mentioned earlier, a corporation does possess the right to a fair trial and the right to be presumed innocent, and although these two rights serve an important purpose, ie to ensure that innocent persons are not wrongfully convicted,<sup>190</sup> they may be limited provided that such limitation is justifiable in terms of section 36.

#### 5.4.2. The importance of the purpose of the limitation- section 36(1)(b)

This factor requires the limitation to at least serve some purpose which is worthwhile and important in a constitutional democracy.<sup>191</sup> In other words, the limitation must promote or protect a legitimate or lawful interest.<sup>192</sup> In *Magajane v Chairperson, North West Gambling Board*,<sup>193</sup> the Constitutional Court held that this factor is fundamental to the analysis, because a limitation will not be justified, unless it serves a significant state interest that requires the limitation to be implemented. Therefore, “[t]he court must carefully review the public interest served by the statutory provision and determine the weight that this purpose should carry in the proportionality review”.<sup>194</sup> It is clear that a limitation which does not serve a purpose that contributes to or advances an open and democratic society based on human dignity, equality or freedom is invalid and cannot therefore be justifiable.<sup>195</sup> Although South African common law has made it possible for a corporation to be convicted of a criminal offence, section 332(1) makes it easier to hold corporations criminally liable for crimes committed by the directors, servants and agents because the fault of the aforementioned is imputed to the corporation.<sup>196</sup> Thus section 332(1) does serve an important purpose, because corporations can cause serious economic, social and environmental harm

<sup>186</sup> Currie and De Waal (n 107) 164 and Rautenbach and Malherbe (n 156) 349.

<sup>187</sup> Rautenbach “Proportionality and the limitation clause of the South African bill of rights” 2014 *Potchefstroom Electronic Law Journal* 2228 2255.

<sup>188</sup> Iles (n 185) 80.

<sup>189</sup> Iles (n 185) 80.

<sup>190</sup> *Manamela* case (n 144).

<sup>191</sup> Currie and De Waal (n 107) 166.

<sup>192</sup> Rautenbach and Malherbe (n 156) 350.

<sup>193</sup> 2006 (5) SA 250 (CC).

<sup>194</sup> *Magajane v Chairperson, North West Gambling Board* 2006 (5) SA 250 (CC).

<sup>195</sup> Currie and De Waal (n 106) 166; Iles (n 184) 82 and Rautenbach and Malherbe (n 156) 350.

<sup>196</sup> Farisani (n 33) 215

and there is a clear need to prevent such harm by prosecuting and punishing reckless or negligent corporations.<sup>197</sup> As mentioned earlier, if it were only possible to prosecute the individual and not the corporation, the corporation may be encouraged to implement policies that promote illegal behaviour.<sup>198</sup>

#### 5.4.3. The nature and extent of the limitation – section 36(1)(c)

The third factor requires the court to evaluate the manner in which the law limits the relevant right and the extent to which the law curtails enjoyment of the right.<sup>199</sup> This evaluation is a necessary part of the proportionality enquiry, as proportionality entails that the violation of rights should not be more extensive than that which is warranted by the purpose the limitation seeks to achieve.<sup>200</sup> To determine whether or not a limitation does more harm to a right than that which is necessary to achieve its purpose, requires an enquiry as to how extensive the violation is.<sup>201</sup> It's important to note that this factor is not concerned with the effect the limitation has on the rights-holder, but rather the effect the limitation has on the right itself.<sup>202</sup> Section 332(1) limits a corporation's right to a fair trial and the right to be presumed innocent, by imposing liability upon a corporation irrespective of whether the corporation had reasonable measures in place in order to prevent the crime from occurring or had exercised due diligence.<sup>203</sup> Another way in which section 332(1) violates a corporation's rights is that the moment the director, servant or any other person who acted with the authority or permission of the director or servant is found guilty of a particular offence, the corporation is then automatically considered to be guilty.

#### 5.4.4. The relation between the limitation and its purpose – section 36(1)(d)

This factor has been referred to as the rational connection test,<sup>204</sup> because it requires courts to determine whether the purpose of the limitation, irrespective of its importance, is reasonably connected to the means utilised to achieve that purpose.<sup>205</sup> In *Bel Porto School Governing*

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<sup>197</sup> Wheelwright (n 9) 2.

<sup>198</sup> Foerschler (n 19) 1289.

<sup>199</sup> Iles (n 185) 83.

<sup>200</sup> Currie and De Waal (n 107) 168.

<sup>201</sup> Currie and De Waal (n 107) 168.

<sup>202</sup> Iles (n 184) 83 and *S v Meaker* 1998 8 BCLR 1038 (W).

<sup>203</sup> Borg-Jorgensen and Van der Linde (n 5) 458.

<sup>204</sup> *Ferreira v Levin NO* 1996 1 SA 984 (CC).

<sup>205</sup> Iles (n 185) 83.

*Body v Premier of the Western Cape*,<sup>206</sup> the Constitutional Court held that the rational relationship enquiry means that it must be rationally possible that the limitation may contribute something to the attainment of the purpose, without setting any requirements in respect of the importance of the contribution, the propensity to attain the result with a degree of assurance, the magnitude of the purpose, or the extent of the discretion to choose between alternatives that are all capable of promoting the lawful purpose. Therefore, the enquiry would come to an end if there is no rational connection between the limitation and its purpose, and if the limitation only marginally contributes to achieving its purpose, then it cannot be an adequate justification for a violation of a fundamental right.<sup>207</sup>

Section 332(1) ensures that corporations do not escape criminal liability which arises from its unlawful activities without having to determine the blameworthiness of the corporation and thus does not only serve to prevent corporate crime but also to deter corporate crime.<sup>208</sup> It is submitted that there is a rational connection between the purpose of section 332(1) and the limitation imposed by it because of the impact corporate criminal liability can have on the South African economy and the damage that corporations could cause to society and the environment if they were not held criminally liable.<sup>209</sup> If corporations were not held criminally liable for their unlawful acts, they may be encouraged to commit such acts, and lay the blame on their employees.<sup>210</sup>

#### 5.4.5. Less restrictive means to achieve the purpose – section 36(1)(e)

Although all the factors in section 36(1) of the constitution are important to determine whether or not a limitation is reasonable and justifiable, it is this factor on which litigation arguments will stand or fall.<sup>211</sup> If there are alternative methods in which the purpose of the limitation can be achieved, that will not restrict rights at all or will restrict them, but not to the same extent, then the limitation will not be considered to be proportionate.<sup>212</sup> Therefore, if a less restrictive method, that is nonetheless equally effective, is available to achieve the purpose of the limitation, then the less restrictive method should be preferred.<sup>213</sup> It has been emphasised by the constitutional court that the legislative choice involving the best means of limiting the right is affected by considerations of cost, implementation, priorities of social

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<sup>206</sup> 2002 3 SA 265 (CC).

<sup>207</sup> Currie and De Waal (n 107) 169 and Iles (n 185) 83.

<sup>208</sup> Farisani (n 33) 215.

<sup>209</sup> Wheelwright (n 9) 2.

<sup>210</sup> Foerschler (n 19) 1289.

<sup>211</sup> Currie and De Waal (n 107) 171.

<sup>212</sup> Currie and De Waal (n 107) 170.

<sup>213</sup> Currie and De Waal (n 107) 170.

demands, and the need to reconcile conflicting interests, and that, in giving acceptable effect to the factor of less restrictive means, the court must not limit the range of legitimate legislative choice in a particular field.<sup>214</sup>

It is submitted that there are less restrictive means available to the state in order to ensure that corporations will not escape criminal liability. One way is to provide the corporation an opportunity to raise a defence which has not previously been raised by a director, servant or agent of a corporation thereby giving effect to the *audi alteram partem* principle.<sup>215</sup> Another manner in which the purpose of section 332(1) could be achieved is to follow an organisation model to corporate criminal liability, based on the organisational ethos of the corporation.

Therefore, it is clear that section 332(1) does not amount to a reasonable justifiable limitation of a corporation's rights to a fair trial and to be presumed innocent.<sup>216</sup>

## 6. THE WAY FORWARD

As a result of the unconstitutionality of section 332(1), it is clear that an alternative approach to corporate criminal liability should be followed. One solution which could be followed is for the court to sever an unconstitutional provision in such a manner as to render it constitutional. Another solution would be for the Legislature to repeal section 332(1) in its entirety, and replace it with the organisational method to corporate criminal liability. However it is highly unlikely that a corporation will implement a criminal policy, at least not in writing at or before the commencement of the crime.<sup>217</sup> Where a director, servant or agent acted *ultra vires* and committed a crime with the aim of benefiting the company, whereby the company did in fact benefit, the company should be held criminally liable. If the time frame for the enquiry is extended in such a manner as to cover what the corporation had done in order to address the commission of the *actus reus* of an offence, the blameworthiness of the corporation would be easier to determine than when the enquiry is simply confined to the policies the corporation had in place at or before the time of the *actus reus*.<sup>218</sup> Thus, emphasis is not placed on the corporation's general policy of compliance but rather what the

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<sup>214</sup> *Manamela* case (n 144).

<sup>215</sup> *Hoexter* (n 160) 363.

<sup>216</sup> *Borg-Jorgensen and Van der Linde* (n 5) 459.

<sup>217</sup> Fisse and Braithwaite "The allocation of responsibility for corporate crime: individualism, collectivism and accountability" 1986-1988 *Sydney Law Review* 468 504.

<sup>218</sup> Fisse and Braithwaite (n 217) 506.

corporation proposes to do in order to implement a programme of internal discipline, structural reform or compensation.<sup>219</sup>

### 6.1. *Severing the bad from the good*

Section 172(1)(a) of the constitution places an obligation upon a court to declare any law or conduct inconsistent with the constitution invalid, to the extent of its inconsistency, which requires the court to declare invalid only those parts of the particular provision which are unconstitutional.<sup>220</sup> This may be done by means of severance, in which the court will “cut out or strike down” the unconstitutional part of a provision, whilst leaving the remainder intact and thus valid.<sup>221</sup> The objective of severance is to rescue any legislation which contains any constitutional defects and thereby preventing the provision from being declared unconstitutional.<sup>222</sup> This objective may be achieved in one of two ways: actual severance or notional severance.<sup>223</sup> Actual severance involves a process whereby the words and phrases are removed from the legislative provision, whereas notional severance entails leaving the language of the provision intact, but subjecting it to a condition of proper application.<sup>224</sup>

The Constitutional Court<sup>225</sup> laid down two requirements that have to be satisfied before severance can be applied.<sup>226</sup> Firstly, it must be possible to separate the bad from the good and secondly, it must be possible for the remainder of the provision to give effect to the objectives of the law.<sup>227</sup>

If one has to apply actual severance to section 332(1) by limiting its application solely to directors, it would still not cure the possible unconstitutionality of the provision, as it would still impose liability upon the corporation without proving any fault on the part of the corporation or allowing the corporation to raise a defence.<sup>228</sup> Not only would the provision remain unconstitutional, but it would also cause an imbalance between the principles relating to corporate criminal liability and the common law and statutory principles relating to vicarious liability.<sup>229</sup> However, section 332(1) may be constitutional if notional severance

<sup>219</sup> Fisse and Braithwaite (n 217) 506.

<sup>220</sup> Currie and De Waal (n 107) 185.

<sup>221</sup> Botha *Statutory Interpretation - an introduction for students* (2012) 197.

<sup>222</sup> Botha (n 221) 197 and Currie and De Waal (n 107) 185.

<sup>223</sup> Currie and De Waal (n 107) 185.

<sup>224</sup> Currie and De Waal (n 107) 185.

<sup>225</sup> *Coetzee v Government of the Republic of South Africa* 1995 4 SA 631 (CC).

<sup>226</sup> Coetzee case (n 219).

<sup>227</sup> Botha (n 221) 197 and Currie and De Waal (n 107) 185.

<sup>228</sup> Borg-Jorgensen and Van der Linde (n 5) 462.

<sup>229</sup> Borg-Jorgensen and Van der Linde (n 5) 462.

were to be applied. The corporation may thus be held liable subject to the following condition: that the state must prove beyond reasonable doubt, that the corporation had failed to take reasonable precautions to prevent the offence from occurring and failed to exercise due diligence.<sup>230</sup>

## 6.2. Corporate culture: replacing s 332(1)

According to Jordaan, the preferred approach to corporate criminal liability should be an organisational model, such as the corporate culture model, as a solution to the difficulties created by the current South African law concerning corporate criminal liability.<sup>231</sup> This view is supported by Borg-Jorgensen and Van der Linde in that they are of the opinion that the organisational approach is the best point of departure for law reform in South Africa.<sup>232</sup>

It is submitted that the views of the abovementioned authors are correct. This is because South African law makes provision that certain companies may be required to appoint social and ethics committees that will be responsible for monitoring *inter alia* good corporate citizenship, public safety and the prevention of corruption.<sup>233</sup> The King Code of Corporate Governance Principles,<sup>234</sup> also known as King III, requires all corporations to be good corporate citizens by ensuring that corporate citizenship programmes are developed and implemented.<sup>235</sup> In terms of King III, the board of directors should, in encouraging ethical leadership and good corporate citizenship, be responsible for the strategic direction of the corporation and for the control of the corporation, set values which are formulated in the corporation's code of conduct and ensure that its conduct as well as that of its management is in accordance with the values set out in the code of conduct and is adhered to in all aspects of its business.<sup>236</sup> The board of the corporation must ensure that the corporation's ethics are effectively managed, by building and maintaining an ethical corporate culture and by assessing, monitoring, reporting and disclosing of the corporation's ethical performance.<sup>237</sup> The board should also ensure that the corporation adheres to all applicable laws and considers

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<sup>230</sup> Borg-Jorgensen and Van der Linde (n 5) 458.

<sup>231</sup> (n 29) 70 and Van der Bijl (n 72) 761.

<sup>232</sup> (n 34) 700.

<sup>233</sup> Borg-Jorgensen and Van der Linde (n 34) 701, s 72 and reg 42 of the Companies Act 71 of 2008.

<sup>234</sup> The Institute of Directors in Southern Africa King Code of Corporate Governance Principles for South Africa 2009 (hereinafter King III).

<sup>235</sup> King III (n 234) 20.

<sup>236</sup> King III (n 234) 19-20.

<sup>237</sup> King III (n 234) 21.



adherence to non-binding rules, codes and standards.<sup>238</sup> However, it is important to note that King III is not binding upon a corporation and as a result a corporation is not obliged to adhere to its principles.

If the current position were to be reformed to incorporate an organisational approach to corporate criminal liability, based on the corporate culture, which truly recognises corporate fault, the issues relating to constitutionality will probably be removed as the corporation will be held liable for its own criminal offences.<sup>239</sup> The state would then bear the onus of proving the fault of the corporation beyond reasonable doubt.<sup>240</sup> In the event that the corporation fails to establish and maintain a programme of internal discipline, structural reform or compensation it is submitted that once the fault of the corporation has been established, the unlawful conduct of the directors, employees and agents of the corporation may then be attributed to the corporation.<sup>241</sup>

The following is a proposal, based on the Australian Criminal Code Act 12 of 1995 “as it constitutes a comprehensive approach to corporate criminal liability and thus avoids the anomaly of treating certain offences differently from other”<sup>242</sup> as to how section 332(1) should be replaced:

1. Crimes requiring proof of intent:

- (1) “A corporation shall be guilty of an offence if it is proven, beyond reasonable doubt, that the corporation expressly, tacitly, or impliedly authorised or permitted the offence to occur.”<sup>243</sup>
- (2) A corporation shall be deemed to have authorised or given permission, if it is proved that:
  - a) the corporation had a corporate culture that directed, encouraged, tolerated or led to non-compliance with the relevant statutory provision; or
  - b) the corporation failed to create and maintain a corporate culture that required compliance with the relevant statutory provision.<sup>244</sup>

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<sup>238</sup> King III (n 234) 41.

<sup>239</sup> Borg-Jorgensen and Van der Linde (n 34) 700.

<sup>240</sup> Borg-Jorgensen and Van der Linde (n 34) 696.

<sup>241</sup> Fisse and Braithwaite (n 217) 506.

<sup>242</sup> Borg-Jorgensen and Van der Linder (n 34) 700.

<sup>243</sup> s 12.3(1) of the Criminal Code Act 12 of 1995.

<sup>244</sup> s 12.3(3)(c) and (d) Criminal Code Act 12 of 1995.

(3) For purposes of this section a corporate culture is defined as any attitude, policy, rule (written or unwritten), course of conduct or practice existing within the corporation generally or in the part of the corporation in which the relevant activities takes place.<sup>245</sup>

(4) In order to determine whether or not a corporation's culture is tainted, the court will examine all the relevant factors, including:

- (a) Repeated offending by the corporation;
- (b) The code of conduct implanted by the corporation;
- (c) The code of ethics of the corporation;
- (d) Whether authority to commit an offence of the same or a similar nature had been given by a director of the corporation;<sup>246</sup>
- (e) Whether the employee, agent or officer of the corporation who committed the offence believed on reasonable grounds, or should have reasonably expected, that a director of the corporation would have authorised or permitted the commission of the offence<sup>247</sup> and
- (f) Any other factor the court may consider necessary.

## 2 Crimes involving negligence

- (1) Where the fault element of a particular offence is in the form of negligence, the negligent conduct of the corporation must be viewed in its entity.
- (2) For the purposes of this provision, the negligent conduct of the corporation will be established if it is proved that the prohibited conduct is a result of:
  - (a) 'inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers or
  - (b) failure to provide adequate systems for conveying relevant information to relevant persons in the corporation''.

## 7. CONCLUSION

It is clear that corporate criminal liability should, throughout the world, be taken seriously, because of the potential harm that can be caused by a corporation's criminal conduct.<sup>248</sup>

<sup>245</sup> s 12.3(6) of the Criminal Code Act 12 of 1995.

<sup>246</sup> s 12.3(4)(a) of the Criminal Code Act 12 of 1995.

<sup>247</sup> s 12.3(4)(b) of the Criminal Code Act 12 of 1995.

<sup>248</sup> Farisani (n 91) 54.

Although South Africa has taken meaningful steps to ensure that corporations do not escape liability for crimes committed in their names, this area of the law has not developed steadily in accordance with the constitution, because section 332(1) imposes liability upon a corporation without any regard to the blameworthiness of the corporation.<sup>249</sup> Therefore, corporations are found guilty on the basis that the director or servant is guilty, as section 332(1) focuses neither on the manner in which the corporation's activities are managed or organised nor the acts of individuals who may be said to represent the state of mind of the corporation.<sup>250</sup>

As corporations are entitled to certain rights contained in the bill of rights, it is submitted that they are entitled to the overarching right to a fair trial and more specifically the right to be presumed innocent.<sup>251</sup> Although Jordaan contends that corporations are not entitled to the same level of protection as natural persons, they are nonetheless entitled to be protected by these two rights.<sup>252</sup> It is important to note that the right to be presumed innocent confirms our standing in society and in a court of law, as it reflects our belief that the holders of rights (including a corporation) are decent and law abiding members of society, unless the contrary is proven.<sup>253</sup>

Section 332(1) violates the abovementioned rights of a corporation, because a corporation is held vicariously liable despite the fact that it had measures in place to prevent the crime from occurring and is not entitled to raise a defence relating to the fact that it acted with due diligence.<sup>254</sup> Therefore, a corporation is held vicariously liable, without fault, on the basis that the individual who committed the unlawful act is guilty, despite the existence of reasonable doubt to its own blameworthiness.<sup>255</sup> Although a corporation's rights are not absolute, section 332(1) does not constitute a reasonable and justifiable limitation in terms of section 36 of the constitution, because there are less restrictive methods available to ensure that corporations do not escape criminal liability.

Therefore, it is submitted that section 332(1) is inconsistent with the supreme law of South Africa, and thus unconstitutional.<sup>256</sup> South Africa should not continue to rely on an inadequate and unconstitutional manner of imposing criminal liability on corporations, until

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<sup>249</sup> Farisani (n 91) 54.

<sup>250</sup> Farisani (n 33) 219 and Nana (n 86) 101.

<sup>251</sup> Borg-Jorgensen and Van der Linde (n 5) 458 and s 8(4) of the constitution.

<sup>252</sup> Jordaan (n 29) 68.

<sup>253</sup> Hoctor "Dignity, criminal law and the bill of rights" 2004 *South African Law Journal* 304 307.

<sup>254</sup> Borg-Jorgensen and Van der Linde (n 5) 458.

<sup>255</sup> Borg-Jorgensen and Van der Linde (n 5) 458.

<sup>256</sup> s 1(2) of the constitution.

an unfortunate event occurs which will prompt the legislature to reconsider this important issue.<sup>257</sup> Accordingly, notional severance needs to be applied to section 332(1), requiring the state to prove beyond reasonable doubt that the corporation failed to take any reasonable measures to prevent the occurrence of the crime. Alternatively, the vicarious liability model which is enshrined in section 332(1) should be replaced with an organisational method, based on corporate culture, in which the onus is on the state to prove organisational fault.<sup>258</sup>

Although both notional severance and the organisational model would remove any constitutional concerns concerning corporate criminal liability in South Africa, it is submitted that the preferred approach should be the organisational model, as this model is deemed to promote the spirit, purport and objects of the bill of rights, because not only will the rights of the corporation not be infringed upon and thus, adequately protected, but the over-breadth of section 332(1) shall be eliminated as well.<sup>259</sup>



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<sup>257</sup> Borg-Jorgensen and Van der Linde (n 34) 702.

<sup>258</sup> Borg-Jorgensen and Van der Linde (n 34) 702.

<sup>259</sup> Borg-Jorgensen and Van der Linde (n 34) 702.

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